

**he United States Court of Appeals  
for the Ninth Circuit**

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MYRON SELZNICK, DECEASED, BANK OF AMER-  
ONAL TRUST AND SAVINGS ASSOCIATION, DAVID  
NICK AND CHARLES H. SACHS, EXECUTORS,  
ERS

v.

SIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE RESPONDENT**

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 Technical Changes Act of 1949 (Act of October 25, 1949, 720, 63 Stat. 891, Sec. 7)

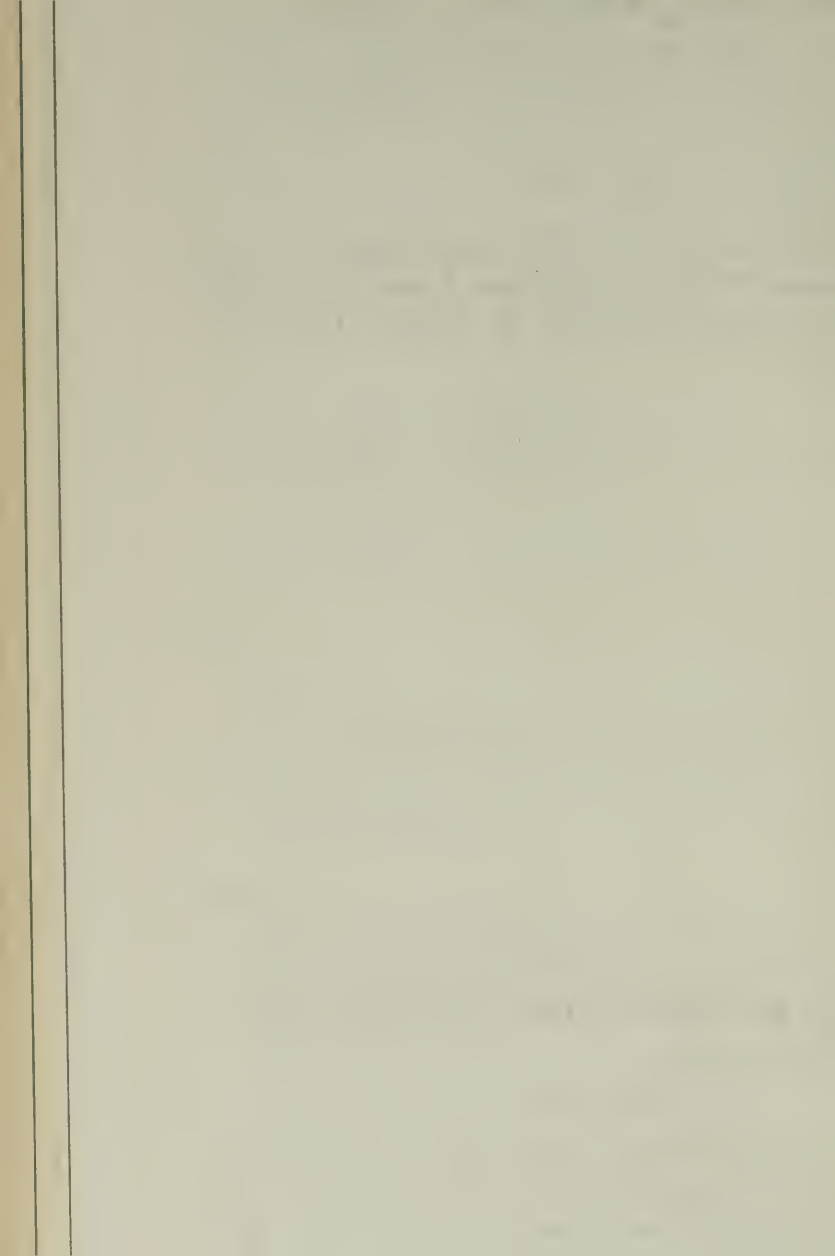
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No. 12980

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VERS

*v.*

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**BRIEF FOR THE RESPONDENT**

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**OPINIONS BELOW**

Memorandum opinion of the Tax Court rendered  
1949 (R. 2, 69-74), is unreported. The opinion  
of the Tax Court on remand,  
dated November 28, 1950 (R. 121-152), are re-  
ported 15 T.C. 716.

**JURISDICTION**

This case involves federal estate taxes. The Commis-  
sioner's notice of deficiency (R. 25-30) was mailed to  
the taxpayers on or about March 27, 1947. (R. 4, 25,

for redetermination under Section 871 (a) Internal Revenue Code. (R. 1, 3-30.) The case was brought to the Tax Court that there is a deficiency in estate tax of \$199,842.44 was entered on June 7, 1949. The case was then brought to this Court by petition for review filed July 29, 1949 (R. 3, 92-97), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of October 25, 1948. On December 28, 1949, this Court entered a mandate vacating that decision and remanding the case to the Tax Court for further consideration pursuant to the stipulation of the parties. (R. 10, 11-12.) After further proceedings, and on April 3, 1950, the Tax Court entered its decision pursuant to the stipulation that there is an overpayment in estate tax in the amount of \$12,108.22, which amount was paid after the filing of the notice of deficiency. (R. 152-153.) The case is now brought to this Court by petition for review filed May 25, 1951 (R. 155-160), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended.

#### QUESTION PRESENTED

Whether assets transferred by the decedent on June 7, 1932, to a trust created by him on January 1, 1932, should be included in his gross estate for the purposes of the federal estate tax under Section 2036(d) or (g) of the Internal Revenue Code.

#### STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

#### STATEMENT

The Tax Court found the following facts (R. 134) :



state tax return of the decedent was filed with  
tor of Internal Revenue for the Sixth District  
nia on June 22, 1945. (R. 124-125.)

January 29, 1932, the decedent created a trust  
ne Citizens National Trust and Savings Bank  
angeles as trustee. (R. 125.)

II of the trust agreement reads as follows (R.

e Trustor agrees that as to the insurance  
es delivered to the Trustee or which may here-  
be delivered to it:

cause each and every policy intended to be  
subject to this agreement and the trusts here-  
r to be made payable to the Trustee by suffi-  
designation as beneficiary thereof, or in such  
manner as the parties hereto and any insurer  
agree, and the Trustee assumes no responsi-  
for the sufficiency or effect of any instrument  
reement by which any policy shall be made  
ble to it.

III of the trust agreement provides, in part  
26):

ring the lifetime of the Trustor, Myron Selz-  
no sale or exchange of property which may at  
ime comprise the principal of the trust estate,  
o change in the investments of the principal of  
rust estate, shall be made by the Trustee ex-  
on the written order and direction of said  
tor or his duly authorized agent, . . . . . ,  
said Trustor during his lifetime hereby re-  
s for himself and/or his agent to be designated  
time to time, the right to direct, in writing,  
Trustee as to the investment of all cash prin-  
in any securities and/or property whether or  
ne same may be approved and permissible by

...med with the Trustee, to revoke said ap  
of David O. Selznick and/or Loyd Wrig  
substitute other persons to act for and  
David O. Selznick and/or Loyd Wright,  
pacities herein in this paragraph pro  
them to act.

Article VI of the trust agreement provide  
(R. 126):

\* \* \* [The trustees] shall, after suffi  
or other securities have been deposited in  
so that the income therefrom shall be  
(until such time the Trustor agrees to  
premiums himself), also pay any and all  
on life insurance policies and/or contra  
may be transferred and/or delivered by th  
to the Trustee pursuant to the terms her

Article VII of the trust agreement reads  
(R. 126-127):

This Trust is irrevocable. The entire m  
received and derived from the trust e  
available for distribution hereunder sh  
said Trustee paid monthly or in other c  
installments as directed by the Trustor  
Selznick for and during his lifetime;  
Myron Selznick, however, reserves the  
direct the Trustee from time to time to cr  
and add any and all income which, pursu  
terms hereof, may be payable to him, to  
cipal of the corpus of the trust estate,  
written instructions from time to tim  
manding.

Article VIII of the trust agreement read  
as follows (R. 127):

the trust estate and available for distribution under shall go and be paid by said Trustee in monthly installments, as follows: [There are various provisions for the distribution of trust income to the decedent's widow, daughters, parents, brothers and their children and a final provision for termination of the trust and distribution of the corpus and for remainder to charity on failure of any of the heirs surviving.]

VIII further provides that (R. 127) :

The Trustor reserves the right to change or substitute, from time to time, the said charitable institutions, by giving notice of such change or substitution to the Trustee in writing.

XI provides as follows (R. 128) :

Notwithstanding the fact that this Declaration of Trust is irrevocable, the Trustor, for himself and on behalf of the beneficiaries, reserves the right to petition any court of competent jurisdiction at any time and from time to time to amend and/or confirm the same; provided, however, that no amendment shall change the provisions of this trust which have the effect or which is intended to or cause the same to be construed to be or amend the same as a revocable trust rather than an irrevocable trust.

The Trustor reserves the absolute right to cancel any insurance policy to be cancelled, and revoke or cause to be cancelled, any of the insurance policies herein referred to, or which may hereafter be added to this trust, provided that he first obtain the written consent of any two of the following, to wit: The Trustors, David O. Selznick and Loyd Wright; provided, however, that upon any cancellation any cash surrender values received on any such policies, shall be paid to the beneficiaries of the trust.

Any income accrued or undistributed amination of any trust or estate hereunto belong and go to the beneficiary or beneficiaries titled to the next eventual estate, in the proportions as the principal hereof, provided ever, that it is an express condition of herein created, which shall take precedence any and all other provisions herein relating to the distribution of the trust estate, that the Trustee is authorized and empowered and may in its absolute discretion, although it is not obliged to do, from the net income and/or principal of the trust estate and in such manner as to it may seem equitable and just, pay a reasonable sum for defraying either in whole or in part the expenses of the last illness and of the funeral of the decedent and/or any specifically named or contingent beneficiary or beneficiaries under said Trust.

The decedent transferred assets to the trust as follows:

On January 29, 1932, decedent transferred to the trust assets (other than life insurance contracts) having a value on the date of decedent's death of \$951.83. After June 6, 1932, decedent transferred to the trust, assets (other than life insurance contracts) having a value on the date of decedent's death of \$817.79, which amount it is stipulated and agreed that, in the event of the death of decedent, is properly includible in decedent's gross estate (and which represents \$28.81 more than the amount reported in the estate tax return on account of the (R. 129.)

Decedent also assigned to the trust, prior to January 29, 1932, life insurance contracts owned by him.

proceeds of the life insurance contracts, date of decedent's death, were \$188,275.31, of which portion allocable to premiums paid prior to January 10, 1941, was \$148,805.10, and the portion allocable to premiums paid after that date was \$39,470.21. The net sum, it is stipulated and agreed, is in any event includible in decedent's gross estate (and which exceeds by \$62.63 more than the amount reported in the tax return on account of the insurance). (R. 130.) Pursuant to the declaration of trust, the net income of the trust was to be paid to Myron Selznick. The trustee paid various amounts to the decedent from time to time as set out on pages 130-132 of the record.

At the date of decedent's death there were \$1,138.36 of net income on hand with the trustee which had not been distributed to the decedent. (R. 132.)

The Commissioner determined in the notice of deficiency that all of the property transferred by the decedent to the trust created on January 29, 1932, should be included in the gross estate of the decedent pursuant to Section 811(c) of the Internal Revenue Code. (R. 133.)

On April 1, 1949, the Tax Court entered a memorandum opinion which sustained the Commissioner's inclusion of the property in the gross estate under Section 811(c), Internal Revenue Code, of certain property transferred by the decedent to the trust. That memorandum opinion was the case of *Commissioner v. Estate of Church*, 16 TC 632. On June 3, 1949, a decision of the Tax Court was entered that there was a deficiency in estate tax of \$99,842.44. The taxpayers appealed to this Court. (R. 123.)

In the proceedings in this Court the parties stipulated

cedent, pursuant to Section 811(c), (d) of the Internal Revenue Code.

The Tax Court held that the property should be included in the decedent's estate under Section 811(c) and based its decision solely on the *Church* case (*Commissioner of Church*, 335 U. S. 632). The Tax Court's opinion was entered herein on 1949. Since that time Section 811(c) has been amended and the rule of the *Church* case has been affected by the amendments. See Act of October 25, 1949, Public Law 378, 81st Cong., 1st Sess. Under the circumstances it seems appropriate that the decision of the Tax Court be vacated and the case be remanded to it for further proceedings.

Accordingly it is hereby stipulated that the decision below should be vacated and the case be remanded to the Tax Court for further consideration in the light of the above-mentioned amendments to Section 811(c), and also subdivisions (d) and (g).

\* \* \* \*

This Court remanded the proceedings to the Tax Court. (R. 123.) The nature of the cause under consideration is set forth therein, in part, as follows (R. 123):

\* \* \* on stipulation of counsel for the parties that the decision of the Tax Court be vacated and the cause remanded to the Tax Court for further consideration:

On Consideration Whereof, It is now considered and adjudged by this Court that the decision of the said Tax Court of the United States in the above cause be, and hereby is vacated, and that the case be, and hereby is remanded to the Tax Court of the United States for further consideration in the light of the amendments of October 25, 1949, to the Internal Revenue Code.



and the Tax Court held (18. 116, 181-182) that assets here involved are includible in the decedent's gross estate for purposes of the federal estate

#### SUMMARY OF ARGUMENT

The Tax Court's decision is correct and can be supported only by the reasoning in the opinion but upon grounds set out in this brief.

Under the rights and powers retained by this decedent over the assets he placed in trust, all of those assets (both non-insurance and insurance) are includible in the gross estate under Section 811(c) or (d) of the Internal Revenue Code, and the insurance is also includible under (g).

#### ARGUMENT

### I

**Assets Here Involved Are Includible in the Grantor's Gross Estate under Section 811(c) of the Code, as**

In this case was first before the Tax Court it held that the property in question should be included in the decedent's gross estate for purposes of the federal estate under Section 811(c) of the Internal Revenue Code and it relied upon *Commissioner v. Estate of Church*, 35 U. S. 632, in that connection. (R. 74.) As pointed out above, Section 811(c) was amended by the Technical Changes Act of 1942. The rule of the *Church* case was affected by the amendments. Therefore, the parties stipulated for a rehearing and pursuant to the stipulation this Court remanded the case to the Tax Court for further consideration in light of the amendments to Section 811(c), subdivisions (d) and (g) of the Internal Revenue

erty in question is includible in the grantor's estate, basing its decision as to the income tax on the property (referred to as the non-insurance assets) on Section 811(c) and its decision as to the insurance assets on Section 811(g) of the Code. (R. 146, 147. The Tax Court did not find it necessary to consider the applicability of subdivision (c) to the insurance assets (R. 151) or to consider subdivision (d) at all (R. 152).

We submit that the result reached by the Tax Court is entirely correct and justified by its reasoning, as well as by other considerations which will hereinafter be outlined. This section of our brief will be confined to a consideration of the provisions of Section 811(c) of the Code. The Tax Court's conclusions that the provisions of Section 811(c) which the Tax Court correctly concluded are applicable to the non-insurance assets, and which provisions are applicable to the insurance assets as well.

Section 811(c) (1) (B) of the Code, as amended by the Technical Changes Act, provides for the inclusion in the decedent's gross estate of property donatively transferred by the decedent if he retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the right to the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the person who shall possess or enjoy the property or the income therefrom. The Technical Changes Act further provides that the amendments shall apply to transfers made after 1939 as follows:

## SEC. 7. TRANSFERS TAKING EFFECT AT DEATH

\*

\*

\*

\*

(b) The amendment made by subsection (b) shall be applicable with respect to estates of decedents dying after February 10, 1939. The



otherwise specifically provided in such section or following sentence) apply to transfers made before, or after February 26, 1926. The provision of section 811(c)(1)(B) of such code shall in the case of a decedent dying prior to January 1, 1950, apply to—

- 1) a transfer made prior to March 4, 1931; or
- 2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (Stat. 1516).

\* \* \* \* \*

In the instant case the decedent died in 1944 and the question were transferred to the trust after March 3, 1931, and prior to June 7, 1932. Therefore, as to Section 811(c) turns on whether the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931, c. 1516. This is as follows:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:*

(c) To the extent of any interest therein of the decedent has at any time made a transfer, trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property (2) the right to designate the persons who shall

quate and full consideration in money or worth."

At this point it seems appropriate to make a statement with respect to the joint resolution pointed out in *Hassett v. Welch*, 303 U. S. 307, which was expressly designed to overcome the effect of *Heiner*, 281 U. S. 238, and other cases following *Burnet v. Northern Trust Co.*, 283 U. S. 782; *v. Burnet*, 283 U. S. 783; *McCormick v. Burnet*, 283 U. S. 784) which held that the retention of title for life of the grantor of a trust was not alone sufficient to support taxation of the transfer as one in which the grantor took effect in possession or enjoyment at or after the grantor's death. The joint resolution was recodified by substance by Section 803(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, with but "slight verbal differences." See *Hassett v. Welch*, *supra*, p. 307. The joint resolution and Section 803(a) of the Act of 1932 were retroactively applicable to transfers made prior to the enactment, and they applied only prospective to transfers with reservation of life income made subsequent to the dates of their adoption (March 3, 1932, and June 6, 1932), respectively. *Hassett v. Welch*, 303 U. S. 307; *Helvering v. Bullard*, 303 U. S. 297; *Commissioner v. Clise*, 122 F. 2d 998 (C. A. 9th), certiorari denied, 303 U. S. 821. The provisions of the joint resolution as amended by 803(a) were carried forward in the Internal Revenue Code (Section 811(c)) and since then above they have also been continued by the Technical Changes Act. However, as also pointed out in the Technical Changes Act does recognize a distinction between the joint resolution and 803(a) and points out that connection that a transfer made after

on this distinction, the taxpayers say (Br. case is without the scope of the joint resolution it would be covered by the 1932 amendments. Bank taxpayers are relying on a shadow that is substance and the Tax Court correctly so held. 46.)

In connection the Tax Court referred (R. 138) following pertinent provisions of the trust:

\* \* The entire net income received and derived from the trust estate and available for distribution hereunder shall be by said Trustee paid wholly or in other convenient installments as directed by the Trustor to Myron Selznick for and during his lifetime; the said Myron Selznick, however, reserves the right to direct the Trustee from time to time to credit, keep and add any and all income which, pursuant to the terms hereof, may be payable to him to the principal of the corpus of the trust estate, by giving written instructions from time to time so demanding.

\* \* \* \* \*

Any income accrued or undistributed at the termination of any trust or estate hereunder shall be paid and go to the beneficiary or beneficiaries entitled to the next eventual estate, in the same proportions as the principal hereof, \* \* \*

The Tax Court noted (R. 138) that on the date of the decedent's death there were \$1,138.36 of accrued income which the trustee had not distributed to the decedent. The Tax Court then carefully considered (R. 146) all of the arguments in the case and concluded that it falls within the scope of the amendatory provisions of the joint resolution. In so concluding the court aptly said (R. 145-146):

trust income accrued to the benefit of the decedent until his power to command the payment of that income was ended by his death. He could have withdrawn this income at any time and in any manner desired merely by so requesting the trustee. The decedent enjoyed the trust income during his life to the extent that he desired. No other person had any claim upon that income until the decedent's death and it was then determined how much income, if any, the decedent had not called upon the trustee to pay over to him. The decedent retained the right to the trust income until the time of his death. The income to which he had a right, which at his death he had not reduced to possession, was no less "retained" by him.

In our opinion, and in the language of the Joint Resolution of 1931, the decedent made a transfer of property which he "retained for his life \* \* \* the right to receive from, the property \* \* \*." We hold, therefore, that the non-insurance assets transferred by the decedent prior to June 7, 1932, to a trust created for him on January 29, 1932, are includible in his estate under section 811(c) of the Code.

We submit that the Tax Court's decision is correct. Here the decedent retained the income in every practical and realistic sense, and whatever may be the effect of the "slight verbal difference" between the joint resolution and the 1932 amendment, they do not affect the taxpayers here and this case falls within the letter and the spirit of the joint resolution.

The taxpayers refer (Br. 10-11) to the provisions of the trust that we have quoted above, and reiterate their argument, rejected by the Tax Court, that because there was some \$1,100 of income accrued at the date of the decedent's death and this went to the succeeding trustee, it necessarily follows that he did not retain

therein pointed out, the trust instrument states words that the income shall be paid to the decedent and during his lifetime" (R. 138), and he had the command over all of the trust income until he died, that is enough to support the tax.

Taxpayers refer (Br. 12-14) to the Committee report on the 1932 amendment (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46-47 (1939-1 Cum. Bull. (Part 2) 491); S. Rep. No. 665, 72d Cong., 1st Sess., pp. 493-1 Cum. Bull. (Part 2) 496, 532)), which is in part as follows:

The purpose of this amendment to section 302(c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by joint resolution of March 3, 1931, which were intended to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has been added, which is without retroactive effect. The changes are:

(1) The insertion of the words "or for any period not ascertainable without reference to his death," is to reach, for example, a transfer where the decedent reserved to himself semiannual payments of the income of a trust which he had established, with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the

-  
Incidentally, it should be noted (R. 63, 128-129) that under

necessary element.

(2) The insertion of the words "or for period which does not in fact end before his death which is to reach, for example, a transferee decedent, 70 years old, reserves the income for an extended term of years and dies during that term or where he is to have the income from and a transferee dies before the death of another person until his own death or such other person predeceases him. This is a clarifying change and does not represent new matter.

(3) The insertion of the words "the right to the income" in place of the words "the income" is designed to reach a case where decedent had a right to the income, though he did not actually receive it. This is also a clarifying change.

Taxpayers say that these reports illustrate a situation not covered by the joint resolution, but that the 1932 amendment was intended to cure. But even if that to be so, it does not help the taxpayers here. Taxpayers rely upon the example in paragraph (c) with respect to reservation of semiannual payments of income, but with the provision that no part of the income between the last semiannual payment to the transferee and his death should be paid to him or his estate. Taxpayers submit that such reliance is misplaced. Even if it be that a situation of that kind would not be covered by the joint resolution, still it is plainly distinguishable from the instant situation because here the grantor retained control of all the income until he died.

The taxpayers also rely (Br. 13-14) upon the applicable Regulations (Treasury Regulations Section 81.18, as amended (Appendix, *infra*)) which contain a similar reference with respect to a reservation of quarterly payments of trust income where no part of the income between the last quarterly payment and



income until he died.

taxpayers say (Br. 14) that the decedent's power of making payments of income is without significance and that we submit it is highly significant and the Tax Court properly took it into consideration in deciding the case in favor of the Commissioner.

We see nothing in the practical construction put upon the provisions of the trust in the instant case that would add to our views. Taxpayers point out (Br. 15) that the periods between income payments to the decedent during his lifetime varied somewhat, and this strengthens the view that he had complete control over the situation and could have the income payments when and if he wanted it. That is what he intended to get and is what he got.

In cases such as *Hassett v. Welch*, *supra*, the taxpayers say (Br. 7-8, 16-17) that this is a doubtful case and that doubt should be resolved in their favor. But we may be the scope of the rule as to resolution of doubts (see *White v. United States*, 305 U. S. 281, 57 S. Ct. 613, 82 L. Ed. 1013) and we submit there is no substantial doubt in this case. In any event the question of statutory construction that is presented should be decided. Cf. *Comptroller v. Nathan's Estate*, 159 F. 2d 546 (C. A. 7th), 77-1 USTC ¶10,000, 33-2 AFTR 10,100, 33-1 USTC ¶9,843, 334 U. S. 843. Doubts disappear when the question is carefully examined.

In the light of the foregoing considerations we submit that the Tax Court correctly held that the non-excluded assets should be included in the grantor's estate for purposes of the federal estate tax under Section 2037(c), as amended.

We wish to add a word with respect to the insurance contracts which we think are also includible under

and that aspect of the case will be discussed in this section of this brief. It is true that the divi-  
unmatured life insurance policies are not gen-  
sufficient significance to merit treating them as  
for purposes of taxation; they are rather treated as  
return of premiums paid. See I Paul, Federal  
and Gift Taxation (1942), Sec. 10.21, p. 543.  
in view of the power of the instant decedent, we  
be more fully discussed hereafter with respect to  
divisions (d) and (g) of Section 811 of the  
surrender the policies for cash and to control the  
ment of the proceeds so that he could in effect  
retained the income from such investments (R.  
128, 150-151), we think that it would not be  
far to hold that the insurance assets, as well as  
insurance assets, are includible under Section  
The Commissioner took that position in the T.  
and indeed the taxpayers appear to recognize  
that the insurance is involved under subdivi-  
The regulations are in harmony with that view.  
Treasury Regulations 105, Section 81.25.  
Paul, Federal Estate and Gift Taxation (1940)  
Section 10.39, pp. 374-376.

In view of the foregoing we submit that a  
property here involved should be included in the  
estate under Section 811(c); and if this Court  
with us as to this it will be unnecessary for it to  
the further aspects of the case which will be  
in the following sections of this brief.

## II

### Subdivision (d) Also Applies

As stated above, in the Tax Court proceed-



but in view of its disposition of the case the court did not find it necessary to pass on the point.

)  
the Commissioner is of course free to rely upon section (d) here (*Helvering v. Gowran*, 302 U. S. 302, 247), and indeed the taxpayers so concede (Br. 1000). We will outline briefly our views with regard thereto. Section 811(d)(2) of the Code provides for inclusion of property donatively transferred by the decedent if the enjoyment was subject at the date of his death to any change through the exercise of a power, by the decedent alone or in conjunction with any other person, to alter, amend, or revoke.

Instant trust contains the following provisions (Exhibit 28):

Notwithstanding the fact that this Declaration of Trust is irrevocable, the Trustor, for himself and on behalf of the beneficiaries, reserves the right to petition any court of competent jurisdiction at any time and from time to time to amend and/or to alter the same; provided, however, that no amendment shall change the provisions of this trust which shall have the effect or which is intended to cause the same to be construed to be or to be a revocable trust rather than an irrevocable one.

The Trustor reserves the absolute right to cancel or cause to be cancelled, and revoke or cause to be revoked, any of the insurance policies herein referred to, or which may hereafter be added to this trust, provided that he first obtain the written consent of any two of the following, to-wit: The Trustor, David O. Selznick and Loyd Wright; provided further, that upon any cancellation any cash surrender values received on any such policies shall

graph above, although the second paragraph particularly with insurance policies, should borne in mind in connection with (d).

We submit that under the provisions of the t decedent had a power to alter or amend which cient to justify taxation under subdivision (d).

It is settled that the statute applies to a ca the grantor of a trust reserved the power to shares of beneficial interest therein, even th could not direct payment to himself (*Commis Estate of Holmes*, 326 U. S. 480; *Porter v. sioner*, 288 U. S. 436; *Commissioner v. Newb tate*, 158 F. 2d 694 (C. A. 2d); *Mollenberg's Commissioner*, 173 F. 2d 698 (C. A. 2d); *M Maloney*, 121 F. 2d 257 (C. A. 3d), certiorari 314 U.S. 636; *Thorp's Estate v. Commissioner* 2d 966 (C. A. 3d), certiorari denied, 333 U. S. *re Tyler's Estate*, 109 F. 2d 421 (C. A. 3d); *Gug v. Helvering*, 117 F. 2d 469 (C. A. 2d), certiorari 314 U. S. 621; I Paul, Federal Estate and Gift T (1942) and 1946 Supplement, Section 7.09) makes no difference whether the power was ex by the grantor individually or as trustee. *sioner v. Newbold's Estate*, *supra*; *Jennings v* 161 F. 2d 74 (C. A. 2d); *Estate of Nettleton v. sioner*, 4 T. C. 987.

See also *Commonwealth Trust Co. of Pitts Driscoll*, 50 F. Supp. 949 (Pa.), affirmed, 137 I (C. A. 3d), certiorari denied, 321 U. S. 764.

Hence it is clear that (d) applies to a case w grantor reserved the power to change the schem joyment of the trust property in a substantial

We submit that this is such a case. Here th

It should make it revocable. It seems clear power would have justified any amendments by the settlor short of actually revoking the trust agreement, Trusts (1935), Section 37) and therefore property is taxable under Section 811(d).

, the statute applies even where the power to exercise is only exercisable in conjunction with persons having adverse interests (*Helvering v. City Bank Co.*, 298 U.S. 391, 58-1 USTC ¶10,855, 25 AFTR 85; Treasury Regulations 105, Section 81.20-1(a)(ix, *infra*)), and such a power would appear to have less significance than the one in the instant case where the decedent could represent both himself and the beneficiaries.

Taxpayers contend (Br. 19-23) that the power reserved amounted to no more than what the law would imply in its absence and therefore is not enough to justify estate taxation. But we think otherwise; and we understand that the law would imply any such power retained by the decedent here. This power applies not only to procedure but also to substance, and the Service's insistence to the contrary loses sight of the true meaning and scope of the language by which the power was reserved. As noted above, here the decedent was authorized to represent both himself and all of the beneficiaries before any court of competent jurisdiction at any time in petitioning for an amendment of the trust. If he had not reserved this power, he could not have represented other beneficiaries having adverse interests. See *Schram v. Poole*, 97 F. 2d 566 (C. A. 9th); *Estate of Los Angeles v. Winans*, 13 Cal. App. 234; 138 P. 2d 550, 558, pp. 608-627.

The arguments of taxpayers are plainly unsound and

in conjunction with all the other beneficiaries trust and of course this added nothing to what would have conferred in the absence of the preservation. Such a situation is recognized by the applicable Regulations (Treasury Regulations 105.81-20) to be nontaxable. And in that connection the regulation provides:

The provisions of this section do not apply if the power may be exercised only with the consent of all parties having an interest, or contingent, in the transferred property, if the power adds nothing to the rights of the transferee as conferred by the applicable local law.

Here we are concerned with a different sort of trust which in effect gave the settlor control over the assets of the beneficiaries.

The taxpayers say (Br. 24-25) that subdivision (b) has to do with persons, not courts, and that the power is without the scope of the statute because it could only be exercised by court petition. But this argument is plainly unsound. It is clear that the power does not depend upon the capacity in which the trustee held the power and as we have pointed out the power reserved by the grantor as trustee is within the scope of the statute. And of course a power is always subject to the control of a court of equity. In this connection see *Stix v. Commissioner*, 350 U.S. 562 (C. A. 2d), where the court said (p. 563): "The language, however strong, will entirely remove the power held in trust from the reach of a court of equity."

Taxpayers cite cases (Br. 26-27) such as *Commissioner v. Irving Trust Co.*, 147 F. 2d 946 (C. A. 2d) but they have little, if any bearing on the ins-

case; but whatever may be thought as to the effect of the decision in the *Irving Trust Co.* case does not hold or indicate that taxability in a case such as we have here can be avoided merely by saying that the exercise of the power in question is subject to scrutiny by a court of equity. The majority says (Br. 27) that in the instant case there is no internal standard with respect to exercise of the power. Assuming that to be so, it would not weaken our position here and it does not at all detract from the exercise of the power. Here the grantor reserved a broad comprehensive power to alter or amend and that is sufficient to support taxation under subdivision (d) despite the fact that the exercise of the power would require application to a court of competent jurisdiction. In view of the foregoing we submit that all of the assets here involved (both non-insurance and insurance assets) is includible under Section 811(d) as well as under 811(g); and if this Court agrees with us as to either subdivision, it will be unnecessary for it to consider 811(g) which relates solely to insurance and is not discussed in the next section of this brief.

### III

#### **Second, the Insurance Proceeds Are Includible under Section 811(g)**

We submit that whatever may be thought as to the effect of our position with respect to Section 811(d), still, the insurance assets are includible under Section 811(g) of the Code, as amended by Section 104 of the Revenue Act of 1942 and the Tax Court has correctly so held. (R. 146-151.)

Section 811(g), as so amended, relates to amounts received by a beneficiary upon the life



receivable by all other beneficiaries where the policy was purchased with premiums paid directly or indirectly by the decedent or with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The law as so amended is applicable to estates of decedents dying after October 3, 1942; but in determining the proportion of premiums paid by the decedent the amount so paid before January 10, 1941, shall be excluded if at the time after such date the decedent possessed an incident of ownership in the policy.<sup>2</sup>

The instant decedent died in 1944 and so the foregoing provisions are applicable. Under the terms of the statute, outlined above, the insurance proceeds involved are includible if the decedent possessed at his death, or at any time after January 10, 1941, any of the incidents of ownership, exercisable either alone or in conjunction with any other person. We understand that there is any dispute as to this.

The point in dispute is whether the decedent possessed such incidents of ownership. We submit that he did at all times after January 10, 1941, until he died.

The second paragraph of Article XI of the will instrument (which we referred to above in connection with (d)) contains the following language (Exhibit 149):

The Trustor reserves the absolute right to cause the trust or cause to be cancelled, and revoke or cause to be revoked, any of the insurance policies hereinafter

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<sup>2</sup> The law was further amended by Section 502(a) of the

to, or which may hereafter be added to this trust, provided that he first obtain the written consent of any two of the following, to wit: The trustee, David O. Selznick and Loyd Wright; provided further, that upon any cancellation any surrender values received on any such policies, remain in and/or be added to the corpus of this trust.

Regulations 105, Section 81.27, as amended (see, *infra*), undertakes to define the term "incidental ownership," and provides that it is not confined to ownership in the technical legal sense. Section 81.27 reads as follows:

Incidents of ownership in the policy include, for example, the right of the insured or his estate to receive economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to borrow on it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured exercises an incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example, if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him.

See Paul, Federal Estate and Gift Taxation (1946) Section 10.37, pp. 368-372; H. Rep. No. 2333, 77th Cong., 2d Sess., p. 163 (1942-2 Cum. Bull. 372, 491); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 235 (1942-2 Cum. Bull. 504, 677).

Under the provisions of the trust, quoted above, the insured had the right to cancel and revoke any of the policies with the consent of two other persons, provided, that any cash surrender values received on

The insurance policies were made payable to the trust and the decedent reserved in the trust the power to cancel the insurance policies if he obtained the written consent of any two trustees following: The Trustee, David O. Selznick, and Wright. But the decedent reserved the right to revoke the appointment of the last two trustees above and to "substitute other persons in their place. It is true, as the petitioners contend, that the proceeds of the cancelled policies would not immediately accrue to the decedent. But those proceeds would be invested by the trustee and the income therefrom would go to decedent for his life under the trust agreement. Further, the decedent reserved, in the trust, the right to direct the trustee as to the investment of the trust corpus, and of which the canceled policies would become a part. The investment directed by the decedent would be "approved and permissible by law for the investment of trust funds under the laws of the State of California."

It is apparent that the decedent could have directed the policies and the proceeds representing surrender value would become a part of the trust corpus. Although the proceeds of the policies would not inure to the decedent's income, the income therefrom (since he reserved the right to receive income for life) would go to the decedent. Such investment of the proceeds as the decedent chose to direct. The right to receive the income from such property is an "incident of ownership" within the meaning of the statute.

In our opinion, the proceeds of the insurance policies allocable to premiums paid prior to January 10, 1941, are includible in the decedent's estate under the provisions of section 812 of the Internal Revenue Code, and we so hold.



could amend and thus change the beneficiaries of the trust and in the circumstances this power was limited to an incident of ownership. *Chase Nat. United States*, 278 U. S. 327; *Helvering v. Fitzgerald*, 33 F. 2d 215 (C. A. 2d); *Estate of Welliver v. Commissioner*, 8 T. C. 165.

When all is considered, we think it plain that the facts here had incidents of ownership sufficient to justify the ruling under (g), and the authorities amply support

*Chase Nat. Bank v. United States*, *supra*; *Helvering v. Smyth*, 87 F. Supp. 983 (N.D. Cal.), affirmed, 220 F. 2d 100 (C. A. 9th); *Commissioner v. Treganowan*, 220 F. 2d 288 (C. A. 2d), certiorari denied, *sub nom. Treganowan v. Commissioner*, 340 U. S. 853; *Hock v. Commissioner*, 152 F. 2d 574 (C. A. 8th); *Liebmann v. Commissioner*, 148 F. 2d 247 (C. A. 1st); *Schongalla v. Commissioner*, 49 F. 2d 687 (C. A. 2d), certiorari denied, 308 U. S. 736; *Seward's Estate v. Commissioner*, 164 F. 2d 100 (C. A. 4th).

In light of the foregoing considerations we submit that the Tax Court did not err in holding the insurance proceeds includible under Section 811(g).

The taxpayers say (Br. 33) that by the assignments to the trust the decedent completely divested himself of ownership and rights in the contracts, retaining no incident of ownership. But that contention is out of harmony with the reservations in the trust instrument set out above, which the decedent unquestionably retained. Indeed, the taxpayers admit (Br. 34) that the decedent retained under the trust the right with the aid of two other persons to cancel the policies and to receive the event the surrender values were to remain in the trust corpus. However, they contend (Br. 34)

we submit that such contention is plainly  
The authorities cited by taxpayers are not at  
with our position here and none of them hold  
intimates that rights such as retained by this  
do not constitute an incident of ownership  
rights were explicitly reserved in the trust ins  
they are clearly enough to support taxation  
(g) and the Tax Court properly so held.

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In the light of these considerations we su  
all of the assets here involved are includib  
gross estate under Section 811(c) or (d)  
the insurance is also taxable under (g).  
Court's decision is correct and can be supp  
only by the Tax Court's reasoning but upo  
grounds we have set out in this brief.

#### CONCLUSION

The decision of the Tax Court should be  
Respectfully submitted.

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OCTOBER, 1951.

. 811. GROSS ESTATE

the value of the gross estate of the decedent  
be determined by including the value at the  
of his death of all property, real or personal,  
ble or intangible, wherever situated, except  
property situated outside of the United  
s—

\* \* \* \* \*

[as amended by Sec. 7(a) of the Technical  
ges Act of 1949 (Act of October 25, 1949),  
, 63 Stat. 891.] *Transfers in Contemplation  
Taking Effect at, Death.*—

1) *General Rule.*—To the extent of any inter-  
therein of which the decedent has at any time  
le a transfer (except in case of a bona fide  
for an adequate and full consideration in  
ney or money's worth), by trust or other-  
e—

\* \* \* \* \*

(B) under which he has retained for his  
fe or for any period not ascertainable with-  
ut reference to his death or for any period  
hich does not in fact end before his death  
i) the possession or enjoyment of, or the  
ight to the income from, the property, or (ii)  
ne right, either alone or in conjunction with  
ny person, to designate the persons who shall  
ossess or enjoy the property or the income  
herefrom; \* \* \*

\* \* \* \* \*

*Revocable Transfers*—

\* \* \* \* \*

2) *Transfers on or Prior to June 22, 1936*

thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or modify, where the decedent relinquished any such power in contemplation of his death, except in a bona fide sale for an adequate and full consideration in money or money's worth.

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\*

\*

(g) [as amended by Section 404(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.]  
*of Life Insurance.*—

\*

\*

\*

\*

(2) *Receivable by Other Beneficiaries.*—The extent of the amount receivable by other beneficiaries as insurance under a policy on the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion to the amount so paid by the decedent bears the same ratio to the total premiums paid for the insurance with respect to which the decedent paid for his death any of the incidents of ownership exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred the policy by assignment or otherwise, a policy on the life of the decedent, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term "incident of ownership" does not include a reversionary interest.

Changes Act of 1949 (Act of October 29,  
20, 63 Stat. 891:

7. TRANSFERS TAKING EFFECT AT DEATH.

\* \* \* \* \*

The amendment made by subsection (a) is applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811(c) of the Internal Revenue Code, as amended by subsection (a), shall (except otherwise specifically provided in such section by the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811(c)(1)(B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

- (1) a transfer made prior to March 4, 1931; or
- (2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (63 Stat. 1516).

\* \* \* \* \*

Act of 1942, c. 619, 56 Stat. 798:

404. PROCEEDS OF LIFE INSURANCE.

\* \* \* \* \*

*Decedents to Which Amendments Apply*—The amendments made by subsection (a) are applicable only to estates of decedents dying on or after the date of the enactment of this Act [October 29, 1942]; but in determining the proportion of premiums or other consideration paid directly by the decedent (but not the total amounts paid) the amount so paid by the decedent on or before January 10, 1941, shall be ex-

SEC. 81.18 [as amended by T.D. 5834, 1 Rev. Bull. 6, 14.] *Transfers with Possession and Enjoyment Retained.*—(a) *General rule.* In the case of a bona fide sale for an adequate and full consideration in money or money's worth, section 811(c)(1)(B) requires the inclusion in the gross estate of the value of all property transferred by the decedent, whether in trust or otherwise, if the decedent retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property (1) for his life; or (2) for any period not ascertainable without reference to his death; or (3) for such a period as to extend beyond his intention that it should extend at the expiration of such period. Except as otherwise provided in paragraph (b) of this section such property is includible without regard to the date the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

A reservation for a "period not ascertainable without reference to his death" may be made by a reservation of the right to receive, in whole or in part, payments, the income of the transferred property, where none of the income between the last payment and the decedent's death was received by him or his estate. This expression includes a reservation of the right to receive income from transferred property after the death of another person who in fact survived the decedent; but in such a case the amount to be included in the gross estate under this section shall not include the value of the outstanding income of such other person. However, if such other person predeceased the decedent, the reservation may be considered to be for the decedent's life for such a period as to evidence his intention to include such income in his gross estate.



ent of the property will be considered as been retained by or reserved to the decedent extent that during any such period it is to lied toward the discharge of a legal obliga- the decedent, or otherwise for his pecuniary

uch retention or reservation is of a part only use, possession, income, or other enjoyment property, then only a corresponding propor- the value of the property should be included ermining the value of the gross estate.

e section 81.15.)

*Estates of decedents dying before January 1,*

-In the case of a decedent who died before ry 1, 1950, property shall not be included gross estate under this section unless trans-

1) after March 3, 1931, and before June 7, 2, and the retention or reservation by the edent was (A) for his life or (B) for such eriod as to evidence his intention that it uld extend at least for the duration of his and his death occurs before the expiration uch period; or

2) on or after June 7, 1932.

. 81.19 [as amended by T. D. 5834, *supra*,  
| *Transfers with Right Retained to Desig-*  
*Who Shall Possess or Enjoy*—(a) *General*  
-Except in the case of a bona fide sale for an  
ate and full consideration in money or  
r's worth, section 811(c)(1)(B) requires the  
ion in the gross estate of the value of all prop-  
ransferred by the decedent, whether in trust  
erwise, if there is retained by or reserved  
n (1) for his life, or (2) for any period not  
ainable without reference to his death, or  
or such a period as to evidence his intention

tion with any other person or persons to the person or persons who shall possess the transferred property or the income. Except as provided in (b) of this section, property is includible without regard to when the transfer was made, whether before or after the enactment of the Revenue Act of 1950.

The rights of designation described in section 811(c)(1)(B) include a reserved power to designate the person or persons who shall, during the decedent's life or during any lesser period prescribed in such section, receive the income from the transferred property or who shall, during such period, possess or enjoy non-income-producing property. Such rights of designation do not, however, include powers over the transferred property itself not affecting the enjoyment of the income during the decedent's life. (See section 81.20.)

If the retention or reservation of the right of designation pertains to a part only of the transferred property, or to a part only of the income therefrom, then only a corresponding proportion of the transferred property is includible in computing the value of the gross estate.

The right to so designate will be treated as having been retained or reserved if at the time of the transfer there was an understanding, expressed or implied, that such right would be created or conferred.

(See section 81.15.)

(b) *Estates of decedents dying before January 1, 1950.*—In the case of a decedent who died before January 1, 1950, property shall not be included in the gross estate under this section unless it was transferred—

(1) after March 3, 1931, and before January 1, 1932, and the right of designation was conferred



expiration of such period; or

2) on or after June 7, 1932.

. 81.20. *Transfers with Power to Change the  
ment.*—(a) *Transfers included.*—Subsection  
f section 811 embraces a transfer by trust  
erwise (if not amounting to a bona fide  
or an adequate and full consideration in  
y or money's worth) when at the time of  
ent's death the enjoyment of the transferred  
rty, or some part thereof or interest therein,  
subject to any change through a power  
sable either by the decedent alone, or by  
n conjunction with some other person or  
as, to alter, or amend, or revoke, or terminate.  
section 81.15.)

In addition to subdivision (d) (1) of the Reve-  
et of 1926, by section 805 of the Revenue Act  
6, of the phrase to the effect that it is not ma-  
in what capacity the power was subject to  
se by the decedent or by the other person or  
as in conjunction with the decedent (which  
e is also embodied in subsection (d) (1) of  
n 811 of the Internal Revenue Code), is con-  
d merely declaratory of the meaning of the  
vision prior to the addition of the phrase.

The second phrase added to this subdivision of  
venue Act of 1926 by amendment in 1936  
mbodied in section 811(d) (1) of the Internal  
ue Code), namely, "without regard to when  
m what source the decedent acquired such  
, " is not considered declaratory of the mean-  
the subdivision prior to the amendment in  
in which no one of the powers enumerated  
subdivision was reserved at the time of the  
g of the transfer, but one or more thereof  
conferred subsequent thereto (whatever the  
from which conferred) without any under-  
ng expressed or implied had in connection



...and a person or persons shall have a substantial adverse interest or interests transferred property, or in conjunction with as one or more of whom had and one or more of whom had not such an adverse interest.

If the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936), and the power was either reserved at the time of the transfer or later created or conferred without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons more of whom had and one or more of whom had not such an adverse interest.

As used in this and in the next succeeding section the expression "reserved at the time of the transfer" refers to a power to which the transfer was subject when made, whether the power arose by operation of law or by the express terms of the instrument of transfer, and which continued to the date of decedent's death (see the paragraph following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in connection with the making of the transfer that the power should later be conferred or conferred.

The power to alter, amend, revoke, or terminate shall be considered to have existed on the date of decedent's death, though the exercise of the power was subject to a precedent giving of notice, though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not exercised before the date of

which had not arrived, or the happening of a particular event which had not occurred, at death. In determining the value of the estate in such cases the full value of the transferred subject to the power should be counted for the period required to elapse between the date of decedent's death and the date at which the alteration, amendment, revocation or termination could take effect.

(See section 81.10(i)(3).)

The provisions of this section do not apply if the power may be exercised only with the consent of all parties having an interest in the property, or contingent, in the transferred property, or if the power adds nothing to the rights of the transferee as conferred by the applicable local law.

SEC. 81.27 [as amended by T. D. 5239, Bull. 1081, 1092.] *Insurance Receivable by Beneficiaries.*—(a) *In case of decedent died after October 21, 1942.*—The regulations prescribed under this subsection (except as otherwise provided herein or in subsection (b) of this section) are applicable only in the case of decedents who died after October 21, 1942, the date of the enactment of the Revenue Act of 1942. In such cases, the value of the aggregate proceeds of all insurance payable at the life of the decedent not receivable by the decedent for the benefit of his estate must also be included in the gross estate, as follows:

(1) Such insurance (not includible under this subsection) purchased with or for consideration, paid directly or indirectly by the decedent, in the proportion of the amount so paid by the decedent to the total premiums paid for the insurance.

(2) Such insurance with respect to which the decedent possessed at his death any community property interest, or a right of ownership, exercisable either

the purposes of (1) of this subsection, in-  
ning the proportion of the premiums or  
consideration paid directly or indirectly by  
edent (but not the total premiums paid)  
ount so paid by the decedent on or before  
y 10, 1941, shall be excluded if at no time  
uch date the decedent possessed an incident  
ership in the policy. For the purpose of  
ceeding sentence a reversionary interest is  
dent of ownership. For a description of  
d other incidents of ownership, see the fol-  
paragraph and subsection (b) of this sec-

the purposes of this section, the term "inci-  
f ownership" is not confined to ownership  
technical legal sense. For example, a power  
ge the beneficiary reserved to a corporation  
ch the decedent is sole stockholder is an  
t of ownership in the decedent. For the  
es of this subsection, the term "incidents  
ership" includes the incidents of ownership  
ed in subsection (b) (except as provided in  
t sentence) and, in addition, includes inci-  
of ownership possessed by the decedent as  
er of the community where the insurance  
is properly held as community property by  
cedent and spouse. Section 811(a)(2), as  
by the Revenue Act of 1942, expressly pro-  
hat for the purposes of section 811(g)(2)  
see (2) of this subsection), but not for the  
es of section 811(g)(2)(A) (see (1) of this  
ion), the term "incidents of ownership"  
ot include a reversionary interest. However,  
gnment of an insurance policy by a decedent  
sing other incidents of ownership therein un-  
ich he reserves a reversionary interest may  
in the proceeds of the policy being includible  
gross estate under section 811(c). See sec-  
..25.

for example, the right of the insured or to its economic benefits, the power to c beneficiary, to surrender or cancel the assign it, to revoke an assignment, to pl a loan, or to obtain from the insurer a lo the surrender value of the policy, etc. insured possesses an incident of owners death is necessary to terminate his inter insurance, as, for example, if the proce become payable to his estate, or payable a direct, should the beneficiary predecease

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